

Chapter 9

Developing Non-Regulatory Tools

9.1 Introduction

When considering the goal of protecting landscape processes and wetland functions, it is helpful to think in the context of creating a diverse “toolbox” of options. The planning approaches discussed in Chapters 6 and 7 provide a way for jurisdictions to envision what their landscapes and wetlands will look like in the future, incorporating the requirements of the Growth Management Act to accommodate development while protecting critical areas. Regulatory tools (discussed in Chapter 8) such as buffers, compensatory mitigation, wetland ratings, and others establish standards for protecting and managing resources when a specific land use action is proposed on a specific site.

Non-regulatory tools discussed in this chapter, including preservation, conservation, restoration, and incentives, can also be used on a site-specific basis or can be applied to an entire management area. Non-regulatory approaches are voluntary in nature and complement the tools used in the regulatory component of a wetland program. Non-regulatory tools are another important part of the toolbox because they:

- Reduce risk to the resource of loss and/or degradation;
- Provide options for landowners and governments to consider in the early stages of making decisions about whether and how landscape processes can be conserved;
- Can address large areas of the landscape and thus be effective in protecting landscape processes and wetland functions;
- Address the needs of those landowners who prefer a voluntary approach;
- Provide a proactive approach to improve landscape conditions that incorporates willing landowner and community participation;
- Help to achieve no-net-loss and make eventual gains in wetland function and acreage; and
- Have financial and tax benefits.

Non-regulatory tools are part of Step 2, prescribing solutions, in the four-step framework discussed in this volume (Figure 9-1).

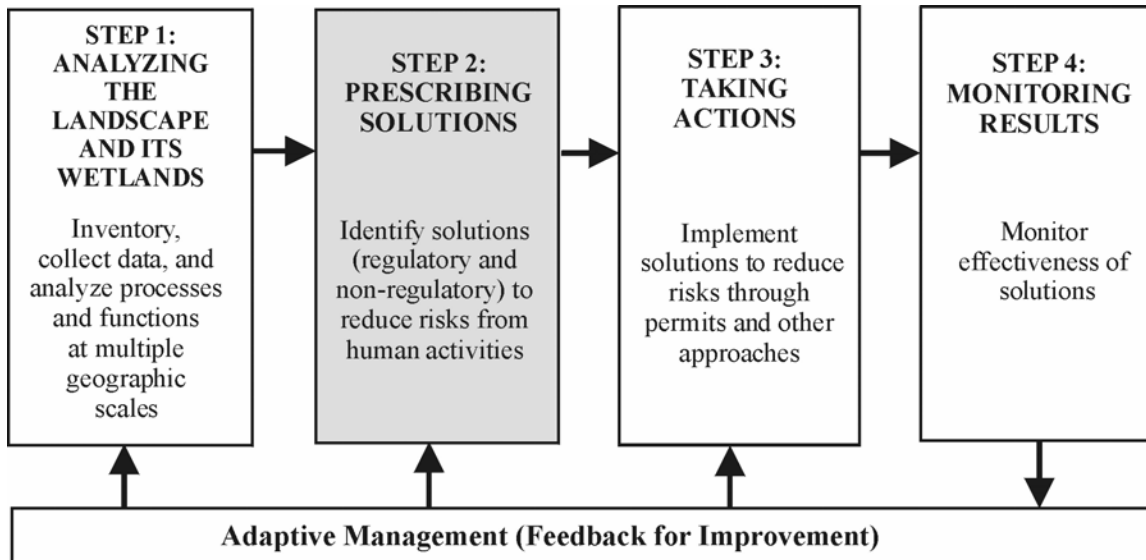


Figure 9-1. Developing non-regulatory tools is part of Step 2 in the four-part framework for protecting and managing wetlands.

Incorporating a non-regulatory program with appropriate implementation tools can occur at any stage of a jurisdiction's planning process. However, the non-regulatory efforts will be most effective if they are incorporated in the early stages of planning; for example, during the formation of a Green Infrastructure plan (Chapter 6). During these early stages, the information from a landscape analysis (Chapter 5) can be used to help the jurisdiction assess options for maintaining landscape processes into the future, and to decide which option provides the most desirable outcome. A non-regulatory program, with selected tools, can then be used as a means to help achieve the desired option.

Preservation, conservation, and restoration are actions that are used in both regulatory and non-regulatory contexts. In the regulatory context, these terms may represent actions that are limited in scope. For example, preservation may be defined narrowly. As described in the recent guidance by Ecology and the U.S. Army Corps of Engineers (April 2004), preservation can be used only under specific conditions such as preserving a wetland that is under immediate threat.

9.2 Establishing the Goals for Non-Regulatory Programs

Non-regulatory actions are those that are voluntary in nature. They fall into three general categories:

- **Preservation** provides a way to set lands aside such that they are not actively used for human activities;
- **Conservation** allows for human activities but limits their impacts by applying best management practices and other measures to protect resource functions; and
- **Restoration** serves to return processes to the landscape. For wetlands, the key restoration step is reestablishment of the appropriate water regime.

Each of these actions can be incorporated at various locations within a jurisdiction. Conducting a landscape analysis (as discussed in Chapter 5) is very helpful in determining how each of these types of non-regulatory actions can supplement regulatory programs to ensure that landscape processes are maintained. Generally, all three of these actions may be desirable for balancing the needs to maintain landscape processes. However, some jurisdictions may find that only one or two of these actions will be the primary focus, while others may incorporate all three.

Conducting the landscape analysis clarifies which non-regulatory action is most relevant to respective locations in a jurisdiction. For example, a particular subbasin may be dominated by agricultural activity and have both water quality problems and a high potential for water quality filtration, if wetlands were restored. In this case, the focus could be improving *conservation* through application of best management practices in agricultural areas, and *restoration* of wetlands with willing landowners. In another subbasin the need might be to *preserve* some wetlands with high-quality habitat fringing an urban growth area.

Understanding the landscape processes therefore helps with the design and implementation of a non-regulatory program. Appropriate tools can then be applied selectively in the areas that are most relevant, or more broadly throughout the management area. A brief overview of preservation, conservation, and restoration in the non-regulatory context is provided below. The specific tools that can be used to implement these non-regulatory actions are discussed in more detail later in this chapter and in the chapter on implementation (Chapter 11).

Preservation

In their paper on *Conservation of Biodiversity in a World of Use*, Redford and Richter (1999) state:

(1) different degrees of human use or alteration result in differential conservation of biodiversity components, (2) some components and

attributes of biodiversity are more sensitive to human use than others, and (3) only extremely limited use or virtually no alteration will protect all components.

Thus, a key role for preservation is to permanently protect those areas that are so highly sensitive to use, so rare or irreplaceable, or so critical to landscape processes that they cannot afford to be degraded or lost.

Preservation employs the permanent protection of land through either:

- Full fee title ownership of all property rights, or
- Partial ownership of the development and/or use rights of the land through a conservation easement.

Conservation easements serve to protect the land in perpetuity by restricting the property deed with conditions for preservation. A “holder” of the conservation easement (such as a land trust) is designated to enforce the terms of the easement through time. Short of full fee purchase, conservation easements are the strongest legal protections available for land preservation.

Conservation

Conservation allows for the active use of the land while retaining landscape processes over time. Conservation applies to areas used for resource production, as well as urbanizing areas where changes in land use might adversely impact a resource. For example, agriculture and forestry landowners are being encouraged to apply “best management practices” such as riparian and wetland buffers.

Conservation of wetlands is a concern in urbanizing settings where adjacent human use affects wetlands and buffers. Improved management practices on the part of homeowner’ associations, private landowners, and project developers can help to reduce impacts. Education and outreach are vital in promoting the use of conservation tools.

Restoration

Restoration provides a method for recovering landscape processes and wetland functions that have been lost or degraded. While regulatory mitigation actions compensate for the loss of acreage or functions as a result of a current development activity, they are not designed to recover wetland acreage or functions that have been lost over time. However, voluntary (non-compensatory) restoration actions can restore acreage and functions lost as a result of past land uses.

Some types of wetlands have been more altered than others due to the relative ease of draining and converting them to other uses. The net result has been a homogenization of the remaining wetland diversity and a shift in the relative proportion of habitat types. In addition, wetlands have been affected in terms of their distance to each other, the connectivity of habitat between them, and their location, distribution, and position within

watersheds. This affects the dispersal of animals and plants between wetlands, and how wetlands affect water quality, flood attenuation, and hydrologic processes (Bedford 1999, citing Brinson 1993). These and other factors need to be considered as part of a non-regulatory wetland restoration effort. Refer to Appendix 9-A for additional considerations in planning restoration projects.

9.3 Cost Savings

One of the most important considerations in the development of non-regulatory goals is cost savings. Cost savings fall into two categories: the maintenance of green infrastructure services, and cost efficiencies through directing non-regulatory efforts toward geographic areas that will provide the greatest benefit.

As discussed in Chapter 6, landscapes and their wetlands provide an array of “green infrastructure” services—flood attenuation, water filtration, water recharge and discharge, etc. Studies have indicated that protecting these green infrastructures instead of having to build infrastructures to replace them actually provides cost savings. When considering the goals of non-regulatory efforts, the jurisdiction should understand these financial implications (see Chapter 6 under “fiscal savings”). Despite the common perception that non-regulatory programs are too expensive, money spent to purchase land for permanent preservation and thus protect its functions and services can result in a significant cost savings over the long term.

Cost efficiencies should be considered in designing a non-regulatory program to maximize performance for dollars spent. A landscape analysis can direct the identification of problem areas within subbasins or watersheds and help to identify appropriate non-regulatory actions and tools. Knowing where processes have been degraded helps to prioritize preservation and restoration actions, while targeting them to the ideal locations and thus using funds effectively. Also, prioritizing which locations need attention first helps to minimize further loss of landscape processes, thus retaining existing green infrastructure.

An active education initiative is an important initial step in promoting non-regulatory efforts. Citizens and political leaders need to understand that the costs of providing built infrastructure can outpace tax revenues generated by new development. They should also be made aware that short-term costs to preserve land, and any loss of tax revenues on that land, will be offset over the long term by fiscal savings from the functions and services the land provides.

Jurisdictions in several parts of the country have conducted fiscal analyses to document the cost savings that a non-regulatory approach can provide. Conveying this information to local leaders and citizens serves to increase understanding and promote support for non-regulatory programs. (Further information on these fiscal savings can be found by reviewing Chapter 6 and Appendix 6-A.)

9.4 Important Parts of a Non-Regulatory Program

Once non-regulatory program goals are established and the scope of the conservation, preservation, and restoration approaches is understood, program components need to be put in place. There are some common components that will need to be considered for any effective non-regulatory program, including:

- Program staffing – coordinator, support staff, site management;
- Identification, mapping, and prioritization of geographic areas where non-regulatory tools will be applied;
- Funding mechanism(s) for conducting project actions;
- Incentive tools for landowner participation;
- Education and technical outreach to the public and landowners;
- Project partners to assist local project actions; and
- Monitoring of project sites and overall program success.

Most of these program components are discussed in the implementation portion of this document (see Chapter 11). However, an overview of key funding and incentives tools is provided below. For more information on funding and incentive options, as well as complete coverage of landowner conservation tools, please refer to the *Exploring Wetlands Stewardship Guide: A Reference Guide for Assisting Washington Landowners and Communities* (Rubey 2004).

9.4.1 Funding Mechanisms

Purchasing land to preserve it, whether in full fee title or through partial development rights, requires some form of local revenue. Common forms of financing for conservation include property tax, sales or use tax, real estate transfer tax, impact fees, special assessment districts, general obligation bonds, and revenue bonds. The ability to raise local revenue for conservation allows the money to be used as a match to obtain additional funds through state or federal grant sources, thus enhancing the local conservation potential.

In *Local Greenprinting for Growth*, the Trust for Public Lands and National Association of County Officials (2002) provide the following table, which summarizes these common conservation financing sources with a list of pros and cons for each.

Table 9-1. Common conservation financing sources.

Financing Source	Definition	Pros	Cons
Property tax	Tax on real property paid for by commercial and residential property owners	Steady source of revenue Relatively easily administered Tax burden distributed Small increases create substantial funding Popular with voters when focuses on compelling land conservation needs	Competition for other public purposes Overall concern among taxpayers about higher rates
Sales & use tax	Tax in sales of goods and services	Relatively easily administered Low reporting costs Can generate large sums, even at small tax levels May be paid in part by out-of-town visitors Can tap into tourism profits generated by open space amenities May include exemptions such as food & medicine	Revenues can drop when economy slows Considered regressive
Real estate tax	Tax on the sales of property paid by either the buyer or seller at time of transfer	Funds can be substantial Nexus between taxing new development and protecting open space	Initial opposition from real estate/development interests can make passage difficult Less predictable revenue stream
Impact fees	One-time fee paid by developer to offset costs of infrastructure needed for new development	Nexus between taxing new development and protecting open space	Parks and open space projects might require direct link to new development

Financing Source	Definition	Pros	Cons
Special assessment district	Special tax district for area that benefits from an open space area	Users finance acquisition and management Predictable revenue stream Accountability in government spending Sense of ownership of and responsibility for area parks and services Can establish in small increments May be able to set own election date and process	Possibly time consuming to implement Overall concern among taxpayers about high rates
General obligation bond	Loan taken out by a city or county against the value of the taxable property	Allows for immediate purchase of open space, locking in land at current prices Distributes the cost of acquisition over time	Extra interest costs of borrowing Voter approval required, sometimes by supermajority levels
Revenue bond	Loan paid from proceeds of a tax levied for the use of a specific public project, or with proceeds of fees charged to those who use the financed facility	Not constrained by debt ceilings of general obligation bonds Voter approval rarely required	More expensive than general obligation bonds
Source: Trust for Public Lands and National Association of County Officials (2002).			

9.4.1.1 Conservation Futures Levy

In Washington, one of the most common forms of conservation revenue comes from the Conservation Futures Levy. RCW 84.34.200 and RCW 84.34.230 establish the authorization for any Washington county to establish a real property tax in the amount of \$0.0625 per \$1,000 of assessed valuation. This provision for local conservation fund-raising is quite unique in the country and presents an opportunity for local communities to acquire and preserve wetlands and other areas that provide green infrastructure services. However, it is currently used by only a third of the counties in the state. Those counties that are using it have been quite successful in preserving important lands within their communities over the years.

General obligation bonds and impact fees, as well, have also been frequently used by local jurisdictions in Washington for conservation purposes.

9.4.1.2 Land Banking

Land banking is an acquisition program that combines taxing real estate sales as a revenue generator with the benefit of purchasing land before it is developed. It was initiated in Massachusetts in 1984. Washington State has a pre-existing authorization, since 1990, to establish a real estate excise tax under RCW 82.46.070 for the establishment of land banks. This authority allows counties to impose a property transfer tax where tax proceeds are used exclusively for fee-simple or less-than-fee acquisition and/or maintenance of conservation areas. The excise tax, initiated either by resolution of the county legislative body or by public petition, is voted on by residents for final approval.

Only one Washington jurisdiction has established this form of tax revenue. The San Juan County Land Bank, established in 1990, has successfully completed conservation easements on 17,000 acres and fee purchase on approximately 900 acres. To date they have received between \$18 million and \$19 million in revenue. After its original 12-year authorization period ended, the program was extended following active campaigning by local real estate agents. The land bank was reauthorized with a 74% approval vote by county residents (Shaffer personal communication, 2003).

A paper by Cummiskey (2001) details the establishment of a Cape Cod land bank during the late 1990s. The author states that despite the existence of numerous planning tools such as building restrictions, zoning bylaws, subdivision regulations, and historic district designations, accelerating development continued to threaten shorelines and other resources. This necessitated the addition of other management tools to protect the lifestyle and natural qualities of Cape Cod. The author points out that more cities and towns in Massachusetts and other states are considering land banks as growth management tools to address coastal development, as well as urban, suburban, and rural sprawl.

9.4.2 Landowner Incentives

A diversity of non-regulatory tools are available that appeal to the interests and needs of different landowners and governments. Many tools offer some form of a market-based incentive to help motivate conservation. These incentives include full and partial-interest (conservation easement) land purchases, tax-based incentives, and incentive zoning with tradable development rights and cluster or higher density alternatives. These tools can be pivotal in helping local governments to achieve the conservation, preservation, and restoration of wetlands and the maintenance of landscape processes.

9.4.2.1 Open Space Current Use Taxation

“Land taxes often act as a disincentive to landowners wishing to conserve natural areas” (Edwards 1994). In *Developing America’s Natural Areas Market*, Edwards states that government can assist in conservation by removing existing disincentives to private

protection of land, and by assisting in developing a natural areas market rather than relying on private conservation programs alone.

This is what Washington's Open Space Current Use Taxation (CUT) Program offers (RCW 84.34). It allows landowners to voluntarily enroll their property in a local county program that offers property tax reductions for the conservation of natural resource features considered of value to the community at large. The optional Public Benefit Rating System (PBRs) affords the local jurisdiction the ability to identify particular natural systems considered most beneficial to the community.

Applying the Public Benefit Rating System as a Watershed Action Tool (Rubey 1999) provides guidance for local jurisdictions that wish to use the PBRs more strategically. Specific criteria are offered to identify properties containing natural resource features that will help ameliorate water quality problems, flooding, habitat loss, and other disturbances in the landscape. Using the PBRs criteria can even be tailored to address different subbasin needs within the overall jurisdiction. This offers flexibility to shape the implementation of the CUT Program to protect landscape processes.

9.4.2.2 Other Incentive-Based Conservation Approaches

There are other ways in which landowners can benefit by protecting and enhancing wetlands. *Exploring Wetlands Stewardship, A Reference Guide for Assisting Washington Landowners and Communities* (Rubey 2004) discusses numerous approaches, including:

- Transferring property title with compensation,
- Transferring title without compensation,
- Retaining ownership and managing the property, and
- Conservation in the context of development.

Exploring Wetlands Stewardship also covers the grant funding programs available to assist with implementation of preservation and restoration projects. A complete listing of state and federal programs, with many local programs, is offered as a reference for matching wetland projects with potential funding.

When acquisition of property and conservation easements (which provide permanent protection) are not available or acceptable to a private landowner, another less permanent option is a resource conservation agreement (also called a "conservation lease"). The conservation lease offers tax relief or a conservation management payment as the incentive for conservation. It is often a preferred approach for agricultural or timber landowners. Main et al. (1999) point out that the system of taxation in the United States discourages private agricultural landowners from maintaining lands in non-profitable land uses, thus fueling the conversion of native habitats and resulting in loss or fragmentation. A conservation lease can offer some compensation to these landowners for conserving lands, rather than converting them to marginal farming lands.

There are numerous conservation tools for working with landowners to conserve, preserve, or restore a wetland. It is important to note that having a broad range of tools available provides something for each individual need. With this in mind, a local government can establish incentive tools (such as a Current Use Taxation Program with a Public Benefit Rating System) early in its planning process to allow for optimum use of these tools.

9.4.3 Incentive Zoning Options

Incentive zoning operates within existing regulatory programs to influence development patterns toward preservation of open space. For example, cluster development requires that development be placed on only a portion of the land parcel, thereby retaining the balance as open space. Incentives for increasing the density of development by up to 20% have been allowed in some communities where creating a larger number of lots than is normally allowed in a development is done in exchange for dedicating additional open space (Smart Growth Network 2002).

The transfer of development rights (TDR) is also frequently considered. Basically, TDR moves the development allowance from a less desirable site with higher resource functions or values to a less sensitive site more suited to development. A strong market component is necessary to fuel the transfer, and very abundant and uncontroversial receiving sites must exist. Also, the proposed preservation zone must have comparatively lower real estate market activity. McGilvray et al. (1985) found that saltmarsh lagoons in coastal communities were hard to preserve using TDR because of the much higher property values and desirability these ocean view sites command.

A recent paper on agricultural land fragmentation examined the spatial effects of three land protection tools in a study conducted in the eastern United States (Brabec and Smith 2002). It compared TDR, purchase of development rights (PDR), and cluster development approaches. The authors found that for maintaining viable agricultural practices against isolation and reduction in size, TDR and PDR tools worked best. Because the area they studied had a strong transfer market, the TDR tool performed well. The TDR resulted in the aggregation of 91% of the parcels into protected areas with an average size of 465 acres. The PDR programs aggregated 75 to 88% in the various communities studied. With the cluster program, 36% of the sites were aggregated (64% isolated) and averaged only 30 acres in size.

Avoiding fragmentation is a key aspect of any preservation strategy, so this study provides valuable insights regarding the potential of these different tools for wetland applications. The analysis and comparison of the three land protection tools reinforces the importance of utilizing and coordinating a variety of non-regulatory tools to achieve optimal results (Brabec and Smith 2002).

